

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1336

RIN 0970-AB37

Native American Programs

AGENCY: Administration for Native Americans, Administration for Children and Families, HHS.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: On September 30, 1992, the Congress passed the Older Americans Act Amendments of 1992, amending the Native American Programs Act of 1974. In accordance with these amendments, the Administration for Native Americans (ANA) is proposing to amend 45 CFR part 1336 to incorporate an appeals procedure for ANA ineligible applications. This action affords the applicants in ANA grant program announcement areas the opportunity to appeal the rejection of an application based on a finding that either the applicant or the proposed activities are ineligible for funding. A successful appeal would lead to reconsideration of the application in the next cycle of grant proposals following the Assistant Secretary's determination to uphold the appeal. It does not guarantee ANA approval for grant funding.

DATES: Interested parties are invited to comment on these proposed amendments. Comments must be submitted on or before June 20, 1995.

ADDRESSES: Submit comments on the proposed rule, in duplicate, to: Administration for Native Americans, ATTN: INELIGIBILITY APPEAL, Room 348-F, HHH Bldg., 200 Independence Avenue, SW., Washington, DC 20201-0001.

Two weeks after close of the comment period, comments and letters will be available for public inspection in Room 348-F, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, Monday through Friday, 7:30 a.m. to 3:30 p.m., telephone (202) 690-7730.

FOR FURTHER INFORMATION CONTACT: Sharon McCully (202) 690-5780.

SUPPLEMENTARY INFORMATION:

I. Program Description

In 1974, the Native American Programs Act (the Act) was enacted as Title VIII of the Economic Opportunity Act of 1964, (Pub. L. 93-644) (42 U.S.C. 2991a *et seq.*) to promote the goal of

social and economic self-sufficiency for American Indians, Alaska Natives, and Native Hawaiians. The legislation was subsequently amended by the Older Americans Act Amendments of 1987 (Pub. L. 100-175), which extended eligibility to Native American Pacific Islanders (including American Samoan Natives), and the Indian Environmental Regulatory Enhancement Act of 1990 (Pub. L. 101-408). Most recently it was amended by the Older Americans Act Amendments of 1992, (Pub. L. 102-375); the Native American Languages Act of 1992, (Pub. L. 102-524); Technical Amendments to Certain Indian Statutes, 1992, (Pub. L. 102-497); and the Older Americans Act Technical Amendments of 1993 (Pub. L. 103-171).

Background

Financial assistance provided by ANA, under the Act, is designed to promote the goal of social and economic self-sufficiency for American Indians, Alaska Natives, Native Hawaiians, and Native American Pacific Islanders through programs and projects that: (1) Advance locally developed social and economic development strategies (SEDS) and strengthen local governance capabilities as authorized by § 803(a); (2) preserve Native American languages authorized by § 803C; (3) improve the capability of the governing body of the Indian tribe to regulate environmental quality authorized by § 803(d); and (4) mitigate the environmental impacts to Indian lands due to Department of Defense activities. The funding for the mitigation of environmental impacts to Indian lands due to Department of Defense activities is authorized by § 809A of the Department of Defense Appropriations Act, 1994 (Pub. L. 103-139). The Act also authorizes a Hawaiian Loan Program in § 803A. Under this program, ANA makes grants to the Office of Hawaiian Affairs of the State of Hawaii to support a revolving loan fund. Because of the unique nature of this program an appeal is unlikely to arise under it, and for this reason ANA has not addressed the question of eligibility of organizations or activities under this program in the regulations.

II. Discussion of Proposed Regulations

These proposed regulations are to establish new procedures mandated by reauthorization legislation, the Older Americans Act Amendments of 1992 (Pub. L. 102-375, Title VIII, Subtitle C; "Native American Programs Act Amendments of 1992"). The proposed regulations would add three new sections to 45 CFR part 1336, subpart C, that would list the categories of eligible applicants and activities that are

ineligible, § 1336.33, requirements for the notice of ineligibility, § 1336.34, and the procedures for appeal of such a determination, § 1336.35.

A successful appeal under § 1336.35 would lead to reconsideration of the application in the next cycle of grant proposals. It does not guarantee ANA approval for grant funding. Furthermore, the decision that an application is deficient by ANA prior to competitive panel review for reasons other than applicant ineligibility or the ineligibility of proposed activities is not appealable under this section and in accordance with section 810(b) of the Act. The decision not to fund an application because it fails the competitive review panel also is not appealable under this section.

Section-by-Section Discussion of the Proposed Changes

In subpart C, part 1336, Native American Projects, we are proposing to include a new § 1336.33, Ineligible applicants and proposed activities which are ineligible. This section lists the categories of organizations which are eligible for four of the grant programs administered by ANA. An organization not within the categories specified for a program is not eligible to receive funding under that program.

The provision also lists activities which, based upon its experience in administering the program, ANA has declined to fund in the past. The Agency has found that these activities are by their nature of limited or no value in furthering the goals of the respective grant programs administered by ANA.

Paragraph (a)(1) lists categories of applicants eligible to apply for SEDS and Preservation and Enhancement of Native American Language grants. The categories are in accordance with Section 803(a) of the Native American Programs Act, as amended, and Section 803C, which provides that organizations eligible under Section 803(a) are also eligible for grants under the Native American languages program. The following are some examples of the eligible organizations listed in paragraph (a)(1): Federally recognized Indian Tribes; urban Indian Centers; consortia of Indian Tribes; Alaska Native villages as defined by the Alaska Native Claims Settlement Act (ANCSA) and/or nonprofit village consortia; public and nonprofit private agencies serving native people from Guam, American Samoa, Palau, or the Commonwealth of the Northern Mariana Islands; public and nonprofit private agencies serving Native Hawaiians; and incorporated non-Federally recognized Tribes.

Under the SEDS program, applications submitted by organizations applying to serve members of a Federally recognized tribe must be submitted through the tribe. This interpretation of the requirements of section 803(a) of the Act reflects the legal principle that Indian tribes possess inherent governmental power over all internal affairs. See, for example, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (Tribe has inherent power to impose severance tax on mining activities). Attributes of sovereign authority of tribes extends over both their members and territory, except where that authority has been withdrawn or modified by treaty or Federal statute. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14 (1987). Tribes generally retain sovereignty by way of tribal self-government and control over other aspects of its internal affairs. *Brendale v. Confederated Tribes and Band of Yakima*, 109 S. Ct. 2994 (1989). When the eligibility requirements of section 803(a) are applied to organizations serving members of a Federally recognized tribe through activities within its jurisdiction it is appropriate to interpret the requirements in light of the principle that tribes have an inherent authority over their internal affairs and over their members. To do otherwise would undermine the ability of tribes to exercise that authority. It is also particularly important in such circumstances to have the support of the tribal government since the grant is intended to further the social and economic development of the tribe and its members.

The requirements of paragraph (a)(1) set forth ANA's interpretation of the eligibility requirements of section 803(a) of the Act. The Agency proposes to remove 45 CFR 1336.30(a) which restates the language of the statute. Continued use of this provision in the regulations would cause confusion. In addition, ANA is removing 45 CFR 1336.30(c) which provides that projects in American Samoa, Guam and the Northern Mariana Islands receive funding under § 803 "subject to the availability of funds." This provision was based upon a requirement in section 803(a) which was deleted in 1992 by Public Law 102-497.

Paragraph (a)(2) lists 5 categories of applicants eligible to apply for funds provided by the Department of Defense (DoD) and ANA for the purpose of mitigating environmental impacts on Indian Lands related to DoD activities. This list was derived from the Environmental Mitigation Program Announcement as published in the

Federal Register: Availability of Financial Assistance; (58 FR 69106; December 29, 1993). ANA does not interpret Section 810(b) of the Act as requiring that applicants under the DoD program have a right to appeal rulings of ineligibility; however the Agency has decided as a matter of policy to include this program under the regulations.

Paragraph (a)(3) lists 5 categories of applicants eligible to apply for funds for the improvement of the capability of tribal governing bodies to regulate environmental quality. The eligible categories of organizations are: (1) Federally recognized Indian Tribes; (2) incorporated non-Federally and State recognized Tribes; (3) consortia of Indian Tribes; (4) Alaska Native villages as defined by the Alaska Native Claims Settlement Act (ANCSA) and/or nonprofit village consortia; (5) Tribal governing bodies (Indian Reorganization Act (IRA) or traditional councils) as recognized by the Bureau of Indian Affairs. The list of 5 categories are derived from the recent program announcement: Availability of Financial Assistance for Improving the Capability of Indian Tribal Governments to Regulate Environmental Quality (59 FR 16650, April 7, 1994).

The regulations do not include a list of organizations eligible for grants authorized by § 805 of the Act, which authorizes grants for research, demonstration and pilot projects. ANA is not currently awarding grants under this provision, nor does it have plans to do so. If, at some point in the future, it does issue an announcement for funding under section 805, the Agency will state which categories of organizations and the types of activities are eligible for funding. Applicants for funding under § 805 which wish to appeal the rejection of an application based on a finding that either the applicant or the proposed activities are ineligible for funding will be able to do so by submitting an appeal as provided for by the proposed 45 CFR 1336.35.

Paragraph (b) provides a nonexclusive list of 7 activities that are ineligible for funding under programs authorized by the Native American Programs Act of 1974. (It is impossible to list all activities that would be considered eligible.) With the exception of one activity, the purchase of real estate, which is prohibited by law, the remaining 6 listed are derived from ANA's past experiences in managing grants and working with organizations, both public and private. Several examples of these are:

(a) Projects in which a grantee would provide training and/or technical assistance

(T/TA) to other tribes or Native American organizations ("third party T/TA"). However, the purchase of T/TA by a grantee for its own use or for its members' use (as in the case of a consortium), where T/TA is necessary to carry out project objectives, is acceptable. Third party T/TA is not an eligible activity because ANA believes it is inefficient to fund organizations which would otherwise be able to apply directly to ANA for TA funding;

(b) Projects that request funds for feasibility studies, business plans, marketing plans or written materials, such as manuals, that are not an essential part of the applicant's SEDS long-range development plan. ANA is not interested in funding "wish lists" of business possibilities. This policy reflects ANA's belief that the limited amount of funds available to the Agency is better used to support activities which directly affect the well-being of the members of Native American communities;

(c) The support of on-going social service delivery programs or the expansion, or continuation, of existing social service delivery programs. This area is covered by other Federal programs and would result in a duplicative effort by ANA; and

(d) Core administration functions, or other activities, that essentially support only the applicant's on-going administrative functions. ANA funds are used for specific products that become self-sustaining and not for the on-going administration of Tribes or organizations. This policy reflects ANA's goal of husbanding the scarce resources available to it.

In § 1336.34, Notice of ineligibility, we propose that upon a finding by the Commissioner that an organization which has applied for funding is ineligible or that the activities proposed by an organization are ineligible, the Commissioner shall inform the applicant, by certified letter, of the decision. The notice must include a statement of the legal and factual grounds for the finding concerning eligibility, a copy of these regulations, and the statement regarding how to appeal the decision.

In § 1336.35, Appeal of ineligibility, we propose to establish the procedures an applicant must follow when seeking to appeal the ANA Commissioner's determination that an applicant, or proposed activities, are rejected on grounds of ineligibility. This section describes the steps that apply when seeking such an appeal. In accordance with the Native Americans Programs Act, Section 810(b), the applicant may make an appeal to the Secretary for review of the determination of ineligibility. The Secretary has delegated the authority for review of appeals made under section 810(b) to the Assistant Secretary for Children and Families. Under this section, the applicant has 30 days following receipt of ineligibility notification to appeal, in writing, the Commissioner's ruling. The

appeal must clearly identify the issues. The Assistant Secretary may appoint an individual who is not a member of the staff of the Administration for Native Americans to develop the record in the appeal and to recommend a decision. The Assistant Secretary or his or her designee shall give the Commissioner 21 days to respond to the applicant's submission and allow the applicant to respond to the Commissioner's submission within 10 days of its receipt by the applicant. The individual presiding over the appeal may request the parties to submit additional information within a specified time period before closing the record in the appeal. The Assistant Secretary will provide a final written decision within 30 days of the closing of the record. If a determination is made by the Assistant Secretary that the applicant or application is eligible, as required by law, the eligibility will not take effect until the next cycle of grant proposals are considered by ANA.

III. Impact Analysis

Executive Order 12866

Executive Order 12866 requires that regulations be drafted to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this rule is consistent with these priorities and principles.

The NPRM amends the current rules to establish an appeal procedure authorized by the Older Americans Act Amendments of 1992. It adds three new sections to 45 CFR part 1336 that list the categories of eligible applicants and ineligible activities, set forth requirements for the notice of ineligibility, and establish procedures on how to appeal determinations of ineligibility made by the Commissioner, ANA. The NPRM also deletes existing provisions from the regulations that are no longer applicable or are rendered obsolete by the proposed provisions. We estimate that these regulations will not result in significant additional costs to the Federal Government or Native American programs.

Regulatory Flexibility Act of 1980

Consistent with the Regulatory Flexibility Act (5 U.S.C. Ch. 6), we try to anticipate and reduce the impact of rules and paperwork requirements on small businesses. For each rule with a "significant economic impact on a substantial number of small entities," we prepare an analysis describing the rule's impact on small entities. Small entities are defined by the Act to include small businesses, small non-

profit organizations and small governmental entities. While this rule would affect small entities, i.e., Alaskan Native villages and non-profit organizations, the impact should be minimal. The only requirement imposed on small entities is for applicant organizations to submit written appeals. For these reasons, the Secretary certifies that these rules will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1980, Public Law 96-511, all Departments are required to submit to the Office of Management and Budget (OMB) for review and approval any reporting or recordkeeping requirement contained in a proposed or final rule. This NPRM does not contain any reporting or recordkeeping requirements, thus, no submission to OMB is required.

List of Subjects in 45 CFR Part 1336

Administrative practice and procedure, American Samoa, Appeals Grant programs—Indians, Grant programs—social programs, Guam, Indians, Native Hawaiians, Northern Mariana Islands, Reporting and recordkeeping requirements.

(Catalog of Federal Domestic Assistance Program Number 93.612 Native American Programs)

Approved: April 4, 1995.

Mary Jo Bane,

Assistant Secretary for Children and Families.

For the reasons set forth in the preamble, 45 CFR part 1336 is proposed to be amended as follows:

SUBCHAPTER D—THE ADMINISTRATION FOR NATIVE AMERICANS, NATIVE AMERICAN PROGRAMS

PART 1336—NATIVE AMERICAN PROGRAMS

The authority citation for part 1336 continues to read as follows:

Authority: 42 U.S.C. 2991 et seq.

2. Section 1336.30 is amended by removing paragraphs (a) and (c) and removing the designation (b) from the remaining paragraph.

3. Sections 1336.33, 1336.34, and 1336.35 are added to read as follows:

§ 1336.33 Eligible applicants and proposed activities which are ineligible.

(a) Eligibility for the listed programs is restricted to the following specified categories of organizations. In addition, applications under the SEDS program from an organization serving members

of a Federally recognized tribe must be submitted through the tribe.

(1) Social and Economic Development Strategies (SEDS) and Preservation and Enhancement of Native American Languages:

(i) Federally recognized Indian Tribes;
(ii) Consortia of Indian Tribes;
(iii) Incorporated non-Federally recognized Tribes;

(iv) Incorporated nonprofit multipurpose community-based Indian organizations;

(v) Urban Indian Centers;

(vi) Public and nonprofit private agencies serving native Hawaiians;

(vii) National and regional incorporated nonprofit Native American organizations with Native American community-specific objectives;

(viii) Public and nonprofit private agencies serving native peoples from Guam, American Samoa, Palau, or the Commonwealth of the Northern Mariana Islands;

(ix) Alaska Native villages as defined by the Alaska Native Claims Settlement Act (ANCSA) and/or nonprofit village consortia;

(x) Incorporated nonprofit Alaska Native multipurpose community-based organizations;

(xi) Nonprofit Alaska Native Regional Associations in Alaska with village specific projects;

(xii) Nonprofit Native organizations in Alaska with village specific projects; and

(xiii) Nonprofit Alaska Native community entities or tribal governing bodies (Indian Reorganization Act or traditional councils) as recognized by the Bureau of Indian Affairs.

(2) Mitigation of Environmental Impacts to Indian Lands Due to Department of Defense Activities:

(i) Federally recognized Indian Tribes;

(ii) Incorporated non-Federally and State recognized Tribes;

(iii) Nonprofit Alaska Native community entities or tribal governing bodies (Indian Reorganization Act (IRA) or traditional councils) as recognized by the Bureau of Indian Affairs;

(iv) Nonprofit Alaska Native Regional Associations and/or Corporations with village specific projects; and

(v) Other tribal or village organizations or consortia of Indian Tribes.

(3) Improvement of the capability of tribal governing bodies to regulate environmental quality:

(i) Federally recognized Indian Tribes;

(ii) Incorporated non-Federally and State recognized Tribes;

(iii) Consortia of Indian Tribes;

(iv) Alaska Native villages as defined by the Alaska Native Claims Settlement

Act (ANCSA) and/or nonprofit village consortia;

(v) Tribal governing bodies (IRA or traditional councils) as recognized by the Bureau of Indian Affairs.

(b) The following is a nonexclusive list of activities that are ineligible for funding under programs authorized by the Native American Programs Act of 1974:

(1) Projects in which a grantee would provide training and/or technical assistance (T/TA) to other tribes or Native American organizations ("third party T/TA"). However, the purchase of T/TA by a grantee for its own use or for its members' use (as in the case of a consortium), where T/TA is necessary to carry out project objectives, is acceptable;

(2) Projects that request funds for feasibility studies, business plans, marketing plans or written materials, such as manuals, that are not an essential part of the applicant's SEDS long-range development plan;

(3) The support of ongoing social service delivery programs or the expansion, or continuation, of existing social service delivery programs;

(4) Core administration functions, or other activities, that essentially support only the applicant's ongoing administrative functions;

(5) The conduct of activities which are not responsive to one or more of the three interrelated ANA goals (Governance Development, Economic Development, and Social Development);

(6) Proposals from consortia of tribes that are not specific with regard to support from, and roles of member tribes. An application from a consortium must have goals and objectives that will create positive impacts and outcomes in the communities of its members. ANA will not fund activities by a consortium of tribes which duplicates activities for which member tribes also receive funding from ANA; and

(7) The purchase of real estate.

§ 1336.34 Notice of ineligibility.

(a) Upon a finding by the Commissioner that an organization which has applied for funding is ineligible or that the activities proposed by an organization are ineligible, the Commissioner shall inform the applicant by certified letter of the decision.

(b) The letter must include the following:

(1) The legal and factual grounds for the Commissioner's finding concerning eligibility;

(2) A copy of these regulations; and

(3) The following statement: This is the final decision of the Commissioner, Administration for Native Americans. It shall be the final decision of the Department unless, within 30 days after receiving this decision as provided in section 810(b) of the Native American Programs Act of 1974, as amended, and 45 CFR part 1336, you deliver or mail (you should use registered or certified mail to establish the date) a written notice of appeal to the Assistant Secretary for Children and Families, 370 L'Enfant Promenade, S.W., Washington, D.C. 20447. You shall attach to the notice a copy of this decision and note that you intend an appeal. The appeal must clearly identify the issue(s) in dispute and contain a full statement of the applicant's position on such issue(s) along with pertinent facts and reasons in support of the position. We are enclosing a copy of 45 CFR part 1336 which governs the conduct of appeals under section 810(b). For additional information on the appeals process see 45 CFR 1336.35.

§ 1336.35 Appeal of ineligibility.

The following steps apply when seeking an appeal on a finding of ineligibility for funding:

(a) An applicant, which has had its application rejected either because it has been found ineligible or because the activities it proposes are ineligible for funding by the Commissioner of ANA, may appeal the Commissioner's ruling

to the Assistant Secretary for Children and Families, in writing, within 30 days following receipt of ineligibility notification. Written notification as described above will be served on the applicant by certified mail.

(b) The appeal must clearly identify the issue(s) in dispute and contain a full statement of the applicant's position on such issue(s) along with pertinent facts and reasons in support of the position.

(c) Upon receipt of appeal for reconsideration of a rejected application or activities proposed by an applicant, the Assistant Secretary will notify the applicant by certified mail that the appeal has been received.

(d) The Assistant Secretary may appoint an individual who is not a member of the staff of the Administration for Native Americans to develop the record in the appeal and to recommend a decision.

(e) The Assistant Secretary or his or her designee shall give the Commissioner 21 days to respond to the applicant's submission under paragraph (a) of this section.

(f) The Assistant Secretary or his or her designee shall allow the applicant to respond to the Commissioner's submission within 10 days of its receipt by the applicant, and may request the parties to submit additional information within a specified time period before closing the record in the appeal.

(g) The Assistant Secretary will review the record in the appeal and provide a final written decision within 30 days following the closing of the record.

(h) If the Assistant Secretary determines that the applicant is eligible or that the activities proposed by the applicant are eligible for funding, such eligibility shall not be effective until the next cycle of grant proposals are considered by the Administration for Native Americans.

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